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InterDent Service Corporation

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

POCATELLO DENTAL GROUP, P.C., an
Idaho professional corporation,

Plaintiff,

v.

INTERDENT SERVICE CORPORATION, a
Washington corporation,

Defendant.

INTERDENT SERVICE CORPORATION, a
Washington corporation,

Third-Party Plaintiff,

Case No. CV-03-450-E-LMB

DEFENDANT ISC'S OPPOSITION TO
ERNEST SUTTON'S RULE 12(B)(6)
MOTIONS TO DISMISS
COUNTERCLAIM

DEFENDANT ISC'S OPPOSITION TO ERNEST SUTTON'S RULE 12(B)(6) MOTIONS
TO DISMISS COUNTERCLAIM - Page 1

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v.

POCATELLO DENTAL GROUP, P.C., an Idaho professional corporation; DWIGHT G. ROMRIELL, individually; LARRY R. MISNER, JR., individually; PORTER SUTTON, individually; ERNEST SUTTON, individually; GREGORY ROMRIELL, individually; ERROL ORMOND, individually; and ARNOLD GOODLIFFE, individually,

Third-Party Defendants.

Defendant and counterclaimant InterDent Service Corporation ("ISC") submits the following memorandum in opposition to Ernest Sutton's motion to dismiss.¹ ISC also submits an Affidavit of Scott Kaplan In Support of ISC's Opposition to Third-Party Defendant Ernest Sutton's Motion to Dismiss ("Kaplan Aff.").

I. Introduction

On October 11, 1996, ISC's predecessor, GMS Dental Group Management, Inc., entered into a Management Agreement with the Pocatello Dental Group (the "Group") whereby ISC acquired the nonprofessional assets of the dental practice presently conducted by the Group in exchange for \$2.8 million in cash and stock to the Group shareholders. (ISC's Counterclaim ¶ 14). Ernest Sutton, a shareholder, personally received \$216,000 cash and \$184,000 in stock (total \$400,000) in the transaction. (Kaplan Aff. ¶ 2, Ex. 1.)

Since the sale, the Group has experienced seller's remorse and has attempted through various means to usurp rights of control that it sold and that legally belong to ISC. Such

¹ This memorandum is very similar to one earlier filed by ISC in opposition to Larry Misner's Motion to Dismiss and to one filed concurrently in opposition to Porter Sutton's Motion to Dismiss. The primary differences between the memoranda relate to documents concerning the respective movants and their respective levels of involvement.

attempts culminated in October 2003, when the Group sued ISC for alleged breach of contract and equitable relief, in particular alleging in relevant part that the consideration for agreement under which Sutton and the other Group shareholders received millions of dollars, the right to manage the practice in a businesslike way under the Management Agreement between the parties, purportedly is "illegal" as constituting the "corporate practice of dentistry." The Group shareholders have not offered to return the proceeds they received in the allegedly illegal transaction.

In response to the Group Shareholders' supposed discovery that the business arrangement they had been working under for seven years was unlawful, in ISC's Answer to Complaint and Counterclaims ("ISC's Counterclaims"), ISC asserted (among other claims and other defendants) two claims against Sutton: fraud in the inducement (counterclaim 6) and, in the alternative, rescission and restitution (counterclaim 7). ISC offered counterclaim 7 merely as an alternative to the tort remedies sought in counterclaim 6; counterclaim 7 is also for fraud. The gist of the claims is that if what ISC's predecessor paid millions of dollars for in 1996 is illegal, ISC is entitled to its money back.

Sutton has moved to dismiss such claims on three grounds: (1) that the claims are insufficiently pled, (2) that they fail to state a claim and (3) that they are barred by the statute of limitations. As detailed below, Sutton's arguments are without merit. The Court should deny the motion to dismiss or, in the alternative, grant ISC leave to amend its pleading.

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II. Argument

A. ISC's Claims Against Sutton Are Sufficiently Pled

Fed. R. Civ. P. 9(b) states: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." The 9th Circuit has interpreted Fed. R. Civ. P. 9(b) to "mean that the pleader must state the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." *Snowbird Construction Co. v. U.S. Dept. of Housing and Urban Development*, 666 F. Supp. 1437, 1442 (D Idaho 1987) citing *Schreiber Distributing Co. v. Serv-Well Furniture Co.*, 806 F. 2d 1393, 1401 (9th Cir. 1986).

ISC's pleading satisfies this standard and the elements of fraud under Idaho law. See *Aspiazu v. Mortimer*, 82 P.3d 830, 832 (Idaho Supreme Court 2003) (listing nine elements of fraud under Idaho law: (1) a representation, (2) its falsity, (3) its materiality, (4) speaker knew of falsity and (5) intended that representation be acted on, (6) the hearer's ignorance of falsity and (7-8) reliance on and right to rely on truth of representation and (9) speaker's consequent injury).

The fraudulent representation was that Sutton and the Group would abide by Article 5.2 of the Management Agreement. (ISC's Counterclaim ¶ 92.) This representation occurred "[w]hen entering into the Management Agreement", which was in October 1996. (*Id.* and *Id.* ¶ 14.)² The Management Agreement and Article 5.2 are material. (*Id.* ¶¶ 15, 91, 93.) ISC relied on the representation and did so to its detriment. (*Id.* ¶¶ 92, 95.) As a Group shareholder, Sutton was a party to and beneficiary of the transaction between ISC and the Group. (*Id.* ¶¶ 14, 93.)

² In his brief, Sutton fails to note that ISC incorporated its earlier allegations into each claim against Sutton. (ISC's Counterclaim ¶¶ 90 & 98.)

Although ISC's allegation that Sutton "never intended to honor [his] agreement in, or abide by the terms of, Article 5.2" is "[b]ased upon information and belief," it is sufficient to survive a motion to dismiss. (ISC's Counterclaim ¶ 94.) Because this allegation goes to Sutton's intent in October 1996, it is entirely consistent with Fed. R. Civ. P 9(b)'s language that "intent *** and other condition of mind of a person may be averred generally." This is precisely what ISC has done.

It is not possible for ISC to know, without taking discovery, precisely what Sutton thought or intended in October 1996. However, ISC has subsequently learned, through the Group's complaint and its application for a temporary restraining order that Sutton and the Group believe that Article 5.2 is invalid, unenforceable and in violation of public policy. (Complaint ¶¶ 19-20.) This is sufficient circumstantial evidence from which a jury could infer Sutton's fraudulent intent.

Sutton correctly argues that a fraud claim should, where possible, "specify such facts as the times, places, benefits received, and other details of the alleged fraudulent activity." *Neubronner v. Milken*, 6 F. 3d 666, 672 (9th Cir. 1993) (citing *Semegen v. Weidner*, 780 F. 2d 727, 731 (9th Cir. 1985)). ISC specified all such facts available to it (detailed above) in support of its claims against Sutton.

B. ISC's Allegations Establish a Claim for Fraud

Sutton's second argument is essentially that ISC cannot establish a fraud claim against Sutton because Sutton had no responsibilities under the Management Agreement. This is simply untrue. ISC's fraud claims against Sutton are based on Sutton's status in October 1996 as Group president and shareholder and as the person who actually signed the Management Agreement as

well as several other integral documents. (See Kaplan Aff., Exs. 1-8; ISC's Counterclaim ¶ 14.) Idaho law permits such claims.

In *L.B. Industries, Inc. v. Smith*, 817 F.2d 69 (9th Cir. 1987), the court considered whether, under Idaho law, a corporate director and a separate minority shareholder could be liable for fraudulent representations by the corporate president. The conclusion was that they could, provided that they "specifically direct, actively participate in, or knowingly acquiesce in the fraud or other wrongdoing of the corporation or its officers." *Id.* at 71 (internal citations omitted). In *L.B. Industries*, it was indisputable that the relevant parties did *not* direct, participate in, or know about the fraudulent representations, so they were not liable. *Id.*

Here, Sutton actively participated in and knowingly acquiesced to the fraudulent representation of the Group in October 1996 that it would abide by Article 5.2 of the Management Agreement. (ISC's Counterclaim ¶¶ 91-92.) In fact, he made such fraudulent representations himself. (*Id.* ¶ 92.) Besides receiving \$400,000 in stock and cash, Sutton personally signed no fewer than eight other documents necessary to consummate the transaction:

- * October 7, 1996 Group Member Resolution (Kaplan Aff. ¶ 4, Ex. 3);
- * October 10, 1996 Assignment Agreement (*Id.* ¶ 5, Ex. 4);
- * October 11, 1996 Agreement & Plan of Reorganization (*Id.* ¶ 2, Ex. 1);
- * October 11, 1996 Non-Compete Agreement (*Id.* ¶ 6, Ex. 5);
- * October 11, 1996 Employment Agreement (*Id.* ¶ 7, Ex. 6);
- * October 11, 1996 Share Acquisition Agreement (*Id.* ¶ 8, Ex. 7);
- * October 11, 1996 Group Members' Certificate (*Id.* ¶ 9, Ex. 8); and
- * October 11, 1996 Waiver & Termination Agreement (*Id.* ¶ 10, Ex. 9).

For these reasons, ISC's claims against Sutton are permissible.

C. The Three-Year Statute of Limitations Does Not Bar ISC's Claims Against Sutton

Sutton's argument regarding the statute of limitations suffers the same defect as detailed in footnote 2—he failed to recognize that ISC incorporated its earlier allegations into each claim against him. (ISC's Counterclaim ¶¶ 90, 98.) Idaho's statute of limitation for fraud is three years from "the discovery, by the aggrieved party, of the facts constituting the fraud". Idaho Code § 5-218.

ISC pled that it did not discover the fraud until October 2003 in connection with the Group's filing of the complaint, the TRO and the Group's negotiations with ISC President Ivar Chhina. (ISC's Counterclaim ¶¶ 45-50.) This is within the three-year limitation period.

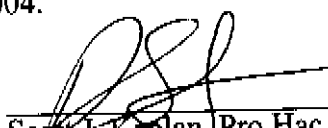
D. Even if the Court Determines That ISC's Claims Against Sutton Are Deficient, The Court Should Grant ISC Leave to Amend Its Claims

If the Court feels that ISC's pleading against Sutton is deficient, it should grant leave to amend unless the Court makes a determination that ISC cannot possibly allege facts consistent with the challenged pleading that will cure the deficiency. *Snowbird Construction Co.*, 666 F. Supp at 1442, citing *Bonanno v. Thomas*, 309 F. 2d 320 (9th Cir. 1962).

III. Conclusion

For the above reasons, the Court should deny the motion to dismiss or, in the alternative, grant ISC leave to amend its pleading.

DATED this 24 day of March, 2004.



Scott J. Kaplan, Pro Hac Vice
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Attorneys for ISC

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **DEFENDANT ISC'S OPPOSITION TO
THIRD-PARTY DEFENDANT ERNEST SUTTON'S RULE 12(B)(6) MOTION TO
DISMISS COUNTERCLAIM** on the following named persons on the date indicated below by

- ☒ mailing with postage prepaid
- " hand delivery
- " facsimile transmission
- " overnight delivery

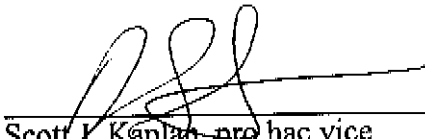
to said persons a true copy thereof, contained in a sealed envelope, addressed to said persons at
his or her last-known addresses indicated below.

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